Office - Supreme Court
FILED
JUL 10 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1950

No. 192

CHARLES SCHARF, individually
and doing business as Paramount Photo Service,
ALBERT HOGLE, and THE FOTOPAK CORPORATION,
Petitioners,

vs.

VALMORE FORGETT, individually and doing business as
SERVICE WELDING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

SAMUEL MILBERG,
Attorney for Petitioners.

307 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5-3432-3

SUBJECT INDEX

Petition

PAGE

QUESTION PRESENTED 2

STATEMENT 2

Brief

OPINION BELOW 4

QUESTION PRESENTED 4

STATEMENT 4

POINT I. By reason of the Court of Appeals' reversal of the District Judgment there is now a substantial conflict between the Third Circuit and the Sixth Circuit 5

POINT II. The judgment of the United States Court of Appeals for the Third Circuit reversing the judgment of the District Court is erroneous 6

POINT III. The mere conference with a sales agent is not violative of the anti-trust laws 7

POINT IV. The suit brought in the Court of Chancery of New Jersey by Scharf alone cannot be characterized as an attempt to monopolize trade or commerce 8

CONCLUSION 9

Cases Cited

	PAGE
Apex Hosiery v. Leader, 310 U. S. 469	6
Appellachian Coals, Inc. v. United States, 288 U. S. 344, 77 L. Ed. 825, 53 S. Ct. 471	8
Hunt *et al.* v. Crumboch *et al.*, 325 U. S. 821	6
International Visible Systems Corporation v. Remington-Rand, Inc., 65 Fed. 2nd, 540	5
Pocahontas Coke Company v. Powhattan Coal and Coke Co., 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268	8
Potts v. Imlay, 4 N. J. Law 330	8
Schneider v. Mueller, 132 N. J. Law, 163	8
Swartz v. Forward Association, 41 Fed. Supp. 294	6, 7

Other Authorities Cited

Title 15, U. S. C. A. (Anti-Trust Laws) Sec. 15	2

IN THE

Supreme Court of the United States

October Term, 1950

No.

CHARLES SCHARF, individually
and doing business as Paramount Photo Service,
ALBERT HOGLE, and THE FOTOPAK CORPORATION,
Petitioners,

vs.

VALMORE FORGETT, individually and doing business as
SERVICE WELDING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Charles Scharf, individually and doing business as Paramount Photo Service, Albert Hogle, and The Fotopak Corporation, pray that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit entered on April 24, 1950.

Question Presented

The question involved is whether or not the Complaint sets forth facts which, singly or in combination, constitute a cause of action upon which recovery may be had under Title 15 U. S. C. A. Section 15.

Statement

Respondent brought suit in the United States District Court for the District of New Jersey for violation of Title 15 Section 15 U. S. C. A. Petitioners prevailed on a motion to strike the Complaint. On the opinion of District Judge Fake (App. 11A) an Order was entered on September 26, 1949 dismissing the Complaint (App. 14A).

Respondent then appealed to the United States Court of Appeals for the Third Circuit. The Opinion of the Circuit Court was filed April 24th, 1950. It reverses the judgment of the District Court (App. Page 17).

The Complaint is found in the Appendix, Pages 1A to 5A inclusive.

Paragraph 13 alleges that the plaintiff was the only commercial manufacturer of certain machines in the United States from March 1946 to November 1947.

Paragraph 14 alleges that the two defendants, Scharf and Hogle, entered into a conspiracy to restrain and monopolize interstate commerce of said machines.

Paragraph 15 alleges that defendant, Hogle, conferred with a New York Corporation which was the selling agent for the plaintiff.

Paragraphs 16, 17, 18, 19 and 23, allege that only the defendant Scharf, instituted an action in the Court of Chancery of New Jersey against the plaintiff; obtained a temporary injunction; that the Chancery suit was not brought in good faith but was malicious and without prob-

able cause; and that subsequently the plaintiff prevailed in said suit after trial thereof.

Paragraph 20 alleges that defendants, Scharf and Hogle, in July 1947 incorporated the Fotopak Corporation, which entered into the business of manufacturing and selling similar machines.

Paragraphs 21 and 22 allege that defendants falsely and maliciously spread statements in and about the photographic development industry, that the defendants were the originators of the machines which were being manufactured and sold by plaintiff and that defendants warned purchasers and prospective purchasers of plaintiff not to purchase machines from plaintiff and threatened them with litigation.

Judge Fake's Opinion (App. Page 12A), after reciting the various acts set out in the Complaint, found that they do not singly or in combination constitute violation of the Anti-Trust Act.

It is the contention of the petitioners that under the anti-trust laws the Court of Appeals was in error in reversing the judgment of the District Court.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The Circuit Court of Appeals for the Third Circuit reversed the District Court for the District of New Jersey (App. Page 17).

Question Presented

The question presented is stated in the Petition (P. 2).

Statement

The statement of the case is contained in the Petition.

There is not one single allegation in the Complaint about (1) price fixing; (2) injury to the public; (3) public interest; (4) or of other elements which are necessary in order to entitle the plaintiff to any recovery for violation of the anti-trust laws. On the contrary, it clearly appears from the Complaint that during all of the times that the defendants are charged with the various acts, the plaintiff, as he states in Paragraph 13 (App. Page 3A) was the only commercial manufacturer in the United States of the machines in question. If in fact there was any monopoly, it was the actual monopoly on the part of the plaintiff. Apparently he is aggrieved, disappointed and distressed because the petitioners entered into competition with his sole monopoly.

Paragraph 16 of the Complaint (App. Page 3A) alleges an action instituted by a single defendant in the New Jersey Court of Chancery in June 1947 and the issuance of a temporary injunction. It is apparent, however, that the injunction was very temporary because Paragraph 12 alleges that plaintiff continued to manufacture and sell until April 1948, a long time after the injunction, and con-

tinued as sole manufacturer until November 1947 (Paragraph 13. App. Page 3A).

The Complaint, at its best, merely states conclusions and immaterial facts, and considering all of the acts charged against the defendants, it utterly fails to state any cause of action for any violation under the anti-trust laws, a conclusion reached by District Court in its Opinion (App. Page 11A).

ARGUMENT

POINT I

By reason of the Court of Appeals' reversal of the District Judgment there is now a substantial conflict between the Third Circuit and the Sixth Circuit.

The Third Circuit disregarded the case of *International Visible Systems Corporation* v. *Remington-Rand, Inc.*, 85 Fed. 2nd, 540, which was decided by the Circuit Court of Appeals for the Sixth Circuit. The acts alleged in the Complaint in *International Visible Systems Corporation* v. *Remington-Rand, Inc., supra,* were more deliberate, bold and forceful than the acts alleged in the instant case.

In the former case there was a definite libel and suits for infringement which were alleged to be malicious and without probable cause. The same question of violation of the anti-trust laws was involved in both cases. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court which dismissed the Complaint for want of a cause of action.

Notwithstanding the decision of *International Visible Systems Corporation* v. *Remington-Rand, Inc., supra,* and the judgment of the District Court in the instant case, the Court of Appeals for the Third Circuit reversed the District Court judgment and thereby created a conflict between the two Circuits.

POINT II

The judgment of the United States Court of Appeals for the Third Circuit reversing the judgment of the District Court is erroneous.

The United States Court of Appeals refused to follow *Swartz* v. *Forward Association,* 41 Fed. Supp. 294, and *Hunt et al.* v. *Crumboch et al.,* 325 U. S. 821.

The Court of Appeals cited *Apex Hosiery* v. *Leader,* 310 U. S. 469, and relied upon the conception of combinations in restraint of trade, as defined in that case. This conception of combinations in restrain of trade, as defined in the Apex case, requires some form of restraint upon commercial competition in the marketing of goods; public wrongs which flow from restrictions or suppression of commercial competition; and price fixing. In the instant case, the Circuit Court of Appeals attempts to bolster the Complaint and strengthen it by reading into it acts and conduct and circumstances which are not therein alleged.

The Court of Appeals seems to have arrived at its decision because it felt that the respondent's new business venture was being interfered with (Transcript Page 22).

There are no allegations in the Complaint which justify the application of this rule of law, as defined in the opinion of the Court of Appeals. The other cases on which the Court of Appeals relies for the reversal of the District Court are inapplicable to the allegations set forth in the Complaint here.

In the instant case the complaint alleges that the petitioners unlawfully combined and conspired to violate the law, and restrain and monopolize trade, and that their acts were unlawful and malicious. These are only general allegations and no more than conclusions. In the absence of any specific acts, singly or in combination, how can it be determined as a matter of law whether the anti-trust

act has been in fact violated with damages to the respondent? It is because of this particular insufficiency that the District Court dismissed the Complaint.

The Court is bound by the allegations of the Complaint and cannot take into consideration facts that might be developed at a trial. *Swartz* v. *Forward Association, supra.*

Reading the bill as a whole, there are no facts alleged which would bring the activities of the petitioners within the prohibitions of the anti-trust laws. The injury complained of is a private wrong which may be remedied in some other court.

Restriction on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough in the Sherman Anti-Trust Act unless the restraint is shown to have or is intended to have an effect on prices or in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.

This is a private controversy, not a prosecution for the common good, and overt acts must be pleaded upon which to ground the statutory liability to the plaintiff. Testing the complaint by the law as laid down in the books, it is apparent that it does not state a claim upon which relief can be granted.

POINT III

The mere conference with a sales agent is not violative of the anti-trust laws.

The Complaint *inter alia* charges the defendant Hogle with holding a conference. Nowhere in the Complaint does it allege that any acts or agreements ever followed as a result of the conference.

It has been held time and again that it is not unlawful for two or more competitors in the same business, acting

independently, to employ the same sales agent when the latter acts independently for each and where none of the competitors has any control over the agent in respect of sale of products of the other competitors.

See:

Appellachian Coals, Inc. v. *United States,* 288 U. S. 344, 77 L. Ed. 825, 53 S. Ct. 471;
Pocahontas Coke Company v. *Powhattan Coal and Coke Co.,* 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268.

POINT IV

The suit brought in the Court of Chancery of New Jersey by Scharf alone cannot be characterized as an attempt to monopolize trade or commerce.

Charles Scharf was the only defendant involved in the Chancery litigation brought in the New Jersey State Court. (See Complaint, Paragraphs 16, etc.) It was a civil suit. There was no arrest. It was nothing more than a lawful means of pursuing his equitable rights.

The law in New Jersey is well settled that an action for malicious prosecution cannot be maintained for prosecuting a civil suit unless the defendant in that suit is arrested without cause and deprived of his liberty.

Potts v. *Imlay,* 4 N. J. Law 330;
Schneider v. *Mueller,* 132 N. J. Law, 163.

Conclusion

It is respectfully submitted that a Writ of Certiorari issue out of this Honorable Court directed to the United States Court of Appeals for the Third Circuit, to the end that this cause may be reviewed and determined by this Court and that the judgment of the United States Court of Appeals for the Third Circuit may be reversed.

Respectfully submitted,

SAMUEL MILBERG,
Attorney for Petitioners.

AUG 9 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 192

CHARLES SCHARF, individually and doing business as Paramount Photo Service, ALBERT HOGLE, and THE FOTOPAK CORPORATION,

Petitioners,

vs.

VALMORE FORGETT, individually and doing business as Service Welding Company,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

ROBERT L. HOOD,
Attorney for Respondent,
1180 Raymond Commerce Building,
Newark, New Jersey.

CHARLES B. MCGRODDY, JR.,
Of Counsel.

APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

INDEX

Cases

	PAGE
Hunt, et al. *v.* Crumboch, et al., 325 U. S. 821	2, 3
International Visible Systems Corporation *v.* Remington Rand, Inc., 65 Fed. 2nd 540 (6th Circuit)	2

Statutes

Anti-Trust Law (15 U.S.C.A., Secs. 1, 2 and 15):	
Sec. 1	1
Sec. 2	1
Sec. 15	1

IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No.

CHARLES SCHARF, individually and doing business as Paramount Photo Service, ALBERT HOGLE, and THE FOTOPAK CORPORATION,

Petitioners,

vs.

VALMORE FORGETT, individually and doing business as Service Welding Company,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

The Court of Appeals for the Third Circuit, reversing the District Court for the District of New Jersey, has held the complaint states a claim upon which relief may be granted against petitioners *i.e.*, for damages under the Anti-Trust Act (Title 15, Sections 1, 2 and 15, U.S.C.A.).

Petitioners, defendants below, pray for certiorari alleging that the decision

> "created a conflict between two Circuits." (Petitioners' Brief, p. 5, last paragraph)

Petitioners cite *International Visible Systems Corporation* v. *Remington Rand, Inc.*, 65 Fed. 2nd 540 (6th Circuit), (erroneously cited in Petitioners' Brief as "85 Fed. 2nd 540) as the conflicting case.

There is no conflict. In the *International* case (*supra*) the complaint, based upon the Anti-Trust Law, alleged only a patent infringement action, brought by defendant maliciously and without probable cause, plus false statements by defendant about plaintiff's patent situation. That complaint did not, as does ours, set out that defendants, as part of their conspiracy to restrain interstate commerce, stopped plaintiff's business by an *ex parte* injunction, obtained maliciously and without probable cause. This fact (App. pp. 3a and 3b) distinguishes our case from the *International* case, and clearly shows that no conflict exists.

The opinion of the Third Circuit (App., p. 17) clearly shows that petitioners' claim of error, based upon *Swartz* v. *Forward Association*, 41 Fed. Supp. 294, and *Hunt, et al.* v. *Crumboch, et al.*, 325 U. S. 821, is baseless, for as the Court of Appeals wrote:

> "It was the failure of certain acts in the course of labor disputes to reveal design or produce consequences within the limitations of the foregoing quotations which made the Sherman Act inapplicable in the Apex case and in the cases which follow it." (App., p. 20)

Both the *Swartz* and the *Hunt* cases involved disputes between labor and management, so that there a choice between motives was available, *i.e.* labor's motive to better its position, and the motive of restraint of trade.

Thus there is neither conflict between Circuits nor error in this case, nor is there any question presented of wide general importance or public interest.

The application is wholly without merit, made solely for the purpose of delay, and should be denied.

Respectfully submitted,

ROBERT L. HOOD,
Attorney for Respondent,
1180 Raymond Commerce Building,
Newark, New Jersey.

CHARLES B. MCGRODDY, JR.,
Of Counsel.